UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. HI-04-1057-PBMo
UPLAND PARTNERS, a Hawaii Limited Partnership,	Bk. No. 97-03746
Debtor.	Adv. No. 02-00043
WILLIAM S. ELLIS, JR.,	
Appellant,	
v.	MEMORANDUM[1]
BARBARA SUMIDA, Trustee; CHARLEY SHIRAISHI, Trustee; BANANA GROWERS OF HAWAII, INC.,	
Appellees.	

Submitted Without Oral Argument
on October 20, 2004

Filed - November 9, 2004

Appeal from the United States Bankruptcy Court
for the District of Hawaii

Honorable Robert J. Faris, Chief Bankruptcy Judge, Presiding

Before: PERRIS, BRANDT and MONTALI, Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

William S. Ellis, Jr. (Ellis) appeals a bankruptcy court order that disposed of an adversary proceeding commenced by the bankruptcy trustee for debtor Upland Partners (debtor). He challenges only the portion of that order that made final an earlier summary judgment ruling that certain limited partners (appellees) are authorized to wind up the affairs of Kula-Olinda Associates (KOA), which is a creditor of debtor in this bankruptcy case. Because we conclude that Ellis lacks standing to appeal the order, we DISMISS the appeal.

FACTS[2]

In 1997, an involuntary bankruptcy petition was filed against debtor, and an order for relief was entered in 1998. At some point, the bankruptcy court appointed a bankruptcy trustee.

KOA claimed to hold a mortgage on the real property that was debtor's principal asset. Debtor, KOA, and Ellis are all closely associated. Ellis is the president and sole shareholder of the corporation that is the general partner of debtor. He is also the president of Olinda Land Corporation, which is the general partner of KOA.

The trustee filed an adversary proceeding against Ellis, KOA, and others, seeking a determination of the validity, extent, and priority of KOA's asserted lien. While the proceeding was pending,

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[2] The facts are drawn primarily from the bankruptcy court's Memorandum Decision Regarding Ellis's Motion for Reconsideration, the trustee's Memorandum in Support of Motion for Approval of Compromise of KOA Claims, Defendants' First Amended Cross-Claim, and Cross-Claim Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

Ellis purported to dissolve KOA and assign all of KOA's assets to himself.

Appellees were allowed to intervene in the adversary proceeding to protect their interests and the interests of the KOA partnership. They filed cross-claims against Ellis, Olinda Land Corporation, and others, alleging various instances of wrong-doing by Ellis and seeking, among other things, an order allowing them to act on behalf of KOA in the adversary proceeding.

The docket does not show that Ellis filed an answer to the cross-claims. In any event, appellees filed a motion for summary judgment, requesting a court order authorizing them to act on behalf of KOA to the exclusion of Ellis, Olinda Land Corporation, or anyone else acting through them, and a determination that, pursuant to state law, they are entitled to wind up the affairs of KOA.

The bankruptcy court granted appellees' motion for summary judgment in part. Specifically, it authorized appellees to act on behalf of KOA, and further ordered that appellees are authorized to wind up the affairs of KOA. Order Granting in Part and Denying in Part Cross-Claim Plaintiffs' Motion for Summary Judgment.

Appellees, acting on behalf of KOA, settled the claim issues with the trustee, and the court entered a judgment in favor of KOA and against debtor for $400,000. Thereafter, the court entered a final judgment disposing of all claims and cross-claims in the adversary proceeding, including the claims and cross-claims against Ellis.

Ellis filed a motion for reconsideration, which the court

denied in a written memorandum decision. Ellis then appealed.

ISSUES

1. Whether the appeal is timely.

2. Whether the appeal is moot.

3. Whether Ellis has standing to appeal.

DISCUSSION

1. Timeliness of appeal

Appellees argue that Ellis's motion for reconsideration was not timely filed, and therefore we do not have jurisdiction to hear the appeal filed after the court denied the motion. They rely on Hawaii District Court Local Rule 60.1, which they say applies to this adversary proceeding pursuant to Local Bankruptcy Rule 7001-1(a)(23). Local Rule 60.1 provides that motions for reconsideration of interlocutory orders may be based only on three grounds, and "must be filed not more than ten (10) business days after the court's written order is filed." In this case, the court entered its summary judgment order authorizing appellees to wind up the affairs of KOA on October 14, 2003. Ellis did not file his motion for reconsideration of that order until after final judgment was entered in the adversary proceeding on December 3, 2003.

If Local Rule 60.1 applied, then Ellis's motion for reconsideration was untimely under the local rules.[3] However, the Local Bankruptcy Rules do not provide that Local Rule 60.1 applies

[3] We need not consider whether the untimeliness under the local rules of a motion for reconsideration would affect the timeliness of an appeal, because we conclude that Rule 60.1 does not apply.

in adversary proceedings. Local Bankruptcy Rule 7001-1(a) provides that certain specific Local Rules "shall apply in all adversary proceedings[.]" Local Rule 60.1 is not on that list. In fact, there is no Local Bankruptcy Rule 7001-1(a)(23), which appellees assert incorporates Local Rule 60.1.[4] Therefore, nothing in the local rules required the motion for reconsideration to be filed within 10 days of the date of the interlocutory summary judgment order.

The appeal is timely. The court entered partial summary judgment on October 14, 2003. Final judgment in the adversary proceeding was entered on December 3, 2003. Fed. R. Bankr. P. 9023, which incorporates Fed. R. Civ. P. 59, requires a motion to alter or amend the judgment to be filed within 10 days after entry of the judgment. Ellis filed his motion for reconsideration on December 15, 2003, which was timely because December 13 was a Saturday.

The bankruptcy court denied the motion for reconsideration on January 14, 2004, and Ellis filed his notice of appeal on January 23, 2004, which was within 10 days after entry of the order denying the motion for reconsideration. It was therefore timely. Fed. R. Bankr. P. 8002(b).

2. Mootness

An appeal becomes moot "when the appellant fails to obtain a stay pending appeal and events occur which prevent the court from

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[4] Local Bankruptcy Rule 7001-1(a) contains subparagraphs (1) through (22). We have reviewed the rules both on Westlaw and on Hawaii's bankruptcy court web site. Neither contains a subparagraph (23).

fashioning effective relief." In re Beatty, 162 B.R. 853, 856 (9th Cir. BAP 1994).

The order on appeal authorizes appellees to wind up the partnership affairs of KOA. Under the Uniform Limited Partnership Act adopted by Hawaii that was in effect at the time of the order in this case,[5] a partnership's affairs could be wound up by "the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners[.]" Haw. Rev. Stat. § 425D-803. Haw. Rev. Stat. § 425D-804 provides that, "[u]pon the winding up of a limited partnership, the assets shall be distributed" to specified parties.

When the bankruptcy court granted the trustee's motion to approve the compromise and settlement of KOA's claims against debtor's estate, the court authorized the trustee "to immediately issue and deliver a check payable to Kula-Olinda Associates in the sum of $400,000.00 to Robert K. Matsumoto, Esq., counsel for the Limited Partners who are entitled to act in their derivative capacity for Kula-Olinda Associates." Order Granting Trustee's Motion for Approval of Compromise at 3.

According to the parties' briefs regarding mootness, which they filed in response to a request from this panel, and the documents they submitted as attachments to those briefs, KOA has received the $400,000 from the trustee. KOA has distributed two checks, one for

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[5] The Uniform Limited Partnership Act provisions pertinent to this appeal were repealed effective July 1, 2004 and replaced by the provisions of the Uniform Limited Partnership Act (Revised), effective July 1, 2004.

$45,000 and another for $90,000, to creditors of KOA. The remainder of the $400,000 apparently remains in the hands of KOA for distribution. If we agreed with Ellis on the merits of the appeal, we could grant effective relief from the order that allows appellees to wind up the affairs of KOA, because there remains winding up to be done. Therefore, the appeal is not moot.

3. Standing

Appellees argue that Ellis does not have standing to appeal the court's order in his individual capacity, because he is not a party aggrieved by the court's order.

In order to have standing to be heard in a chapter 11 case, a person must be "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee[.]" 11 U.S.C. § 1109(b). "The general theory behind the section is that anyone holding a direct financial stake in the outcome of the case should have an opportunity . . . to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." 7 Alan N. Resnick and Henry J. Sommer, Collier on Bankruptcy ¶ 1109.01[1] (15th ed. Rev. 2001)(footnote omitted).

However, even if a person is a party in interest who can appear and be heard in the bankruptcy court, in order to have appellate standing, the party must be a "person aggrieved." In re CFLC, Inc., 89 F.3d 673, 675 (9th Cir. 1996). "An appellant is aggrieved if 'directly and adversely affected pecuniarily by an order of the

bankruptcy court'; in other words, the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights. Fondiller v. Robertson (In Matter of Fondiller), 707 F.2d 441, 442 (9th Cir.1983)." In re P.R.T.C., Inc., 177 F.3d 774, 777 (9th Cir. 1999). The party claiming to have standing must show that the bankruptcy court's order either diminishes its property, increases its burdens, or detrimentally affects its rights. Fondiller, 707 F.2d at 442.

Ellis makes two arguments in support of his standing to appeal the court's order authorizing appellees to wind up the partnership affairs of KOA. First, he argues that he is a creditor of KOA, and so has "a personal stake in the outcome of the controversy." Appellant's Reply Brief at 4. There is nothing in the excerpts of record showing that Ellis is a creditor of KOA. He represents that he "was not a limited or general partner of KOA," Appellant's Reply Brief at 6, and does not explain the basis on which he asserts he is a creditor. Even if Ellis were a creditor of KOA, it is not clear why his rights as a creditor would be affected by who is given the authority to wind up the affairs of the partnership.

Second, Ellis relies on the fact that he was a named defendant in the complaint and the cross-claims. He says that he has "been aggrieved by the appealed order entered against [him] as a formal [party], and thereby detrimentally affecting [his] rights." Appellant's Reply Brief at 12.

It is true that Ellis is a named party in the adversary proceeding. According to the trustee's Memorandum in Support of

Motion to Approve Compromise,[6] Ellis was named as a defendant in the adversary complaint to disallow or subordinate the claims Ellis and the other defendants had filed against the estate. Trustee's Memorandum in Support of Motion to Approve Compromise at 1. After appellees intervened in order to protect the interests of KOA in the proceeding, appellees filed cross-claims against Ellis and others, seeking various forms of relief, including an order allowing appellees to represent the interests of KOA in the adversary proceeding.[7] First Amended Cross-Claim of Intervening Defendants.

However, it does not appear that any order was entered in this case against Ellis. As relevant to this discussion, the court's final order said:

> Plaintiff withdrew without prejudice all claims, except those that have been settled or adjudicated, against all Defendants, including those Defendants not present. Plaintiff further stipulated to withdraw without prejudice all claims against Ellis.
>
> Intervenors withdrew without prejudice all counterclaims and all cross-claims, except those that have been settled or adjudicated, against all Counterclaim and Cross-Claim Defendants, including those Counterclaim and Cross-Claim Defendants not present. The Intervenors further stipulated to withdraw without prejudice all cross-claims not already covered hereinabove against Ellis.

Final Order at 3.

The first paragraph quoted above shows that no judgment was entered against Ellis as a defendant in the original action brought

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[6] The trustee's complaint is not in the excerpts of record.

[7] Appellees alleged in the cross-claims that Ellis was a limited partner of KOA. First Amended Cross-Claim at ¶ 4. However, in his reply brief, Ellis has expressly denied having been a limited partner of KOA at the pertinent time. Appellant's Reply Brief at 6.

by the trustee. The second paragraph shows that no judgment was entered against Ellis on the cross-claims, "except those that have been settled or adjudicated[.]" There is nothing in the excerpts of record showing that any cross-claims against Ellis were settled or adjudicated. Therefore, Ellis has not been detrimentally affected by the final order in the adversary proceeding.

It is unclear how Ellis's rights as an individual are affected by the order authorizing appellees to wind up the affairs of KOA. Ellis does not assert that he individually is entitled to wind up the partnership affairs. Ellis also does not assert that he is a general or limited partner of KOA who should be entitled to wind up the affairs of the partnership.

It is apparent that Ellis has attempted to control the actions of KOA, in particular through his attempted dissolution of the KOA partnership in January 21, 2003. See Verified Notice of Dissolution. However, that attempted dissolution was undertaken by Ellis in his capacity as president of Olinda Land Corporation, KOA's general partner. It was not undertaken by Ellis individually. Therefore, to the extent he is attempting to control the workings of KOA, it must be in his capacity as president of KOA's general partner.

Appellees' motion for summary judgment, in which they sought and received the order of the court allowing them to wind up the affairs of KOA, says that appellees "seek a court order enabling them to act in behalf of Kula-Olinda Associates, . . . to the exclusion of Cross-Claim Defendant William S. Ellis, Jr. . . . ."

Motion for Summary Judgment at 3. Ellis's response to the motion for summary judgment was entitled Position Statement by Ellis as President of Olinda Land Corporation. He did not oppose the motion in his individual capacity. Therefore, it does not appear that the fact that appellees sought to be allowed to wind up the affairs of KOA to the exclusion of Ellis affected Ellis's rights as an individual.

Because Ellis has not demonstrated that he individually is a person aggrieved by the court's order authorizing appellees to wind up the affairs of KOA, he does not have standing to appeal that order, and the appeal must be dismissed.[8]

Finally, we note that the bankruptcy court on reconsideration clarified its order authorizing appellees to wind up the affairs of KOA to meet Ellis's concerns. The court explained that it had jurisdiction to determine who is authorized to represent KOA in the bankruptcy claims process, but then clarified:

> The bankruptcy court's jurisdiction ends, however, when the needs of estate administration end. This court has jurisdiction to decide that the intervening limited partners are entitled to wind up Kula-Olinda Associates because that decision is necessary to determine the allowance and treatment of Kula-Olinda Associates claims, to permit administration of the estate, and to adjust the debtor-creditor relationship

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[8] Appellees make one additional argument that requires mention. They claim that an unpublished Ninth Circuit memorandum dismissing a separate appeal brought by Ellis in debtor's bankruptcy case establishes that Ellis does not have standing to appeal this order. The memorandum, which they attach as part of their excerpts of record, does not indicate what type of order was the subject of that appeal. Whether or not we could consider the unpublished memorandum for its preclusive effect, nothing in that memorandum appears to address the standing question raised by this appeal. Therefore, it does not assist appellees.

between Kula-Olinda Associates and Upland Partners.

Memorandum Decision Regarding Motion by Ellis to Reconsider at 7. The court further limited its holding to make clear that it

> has not assumed and will not assume jurisdiction, however, to supervise the winding up and liquidation of Kula-Olinda Associates or the distribution of its assets. After the trustee makes distribution to Kula-Olinda Associates, another court will have to decide how the money will be allocated among the stakeholders of Kula-Olinda Associates.

Memorandum Decision Regarding Motion by Ellis to Reconsider at 7-8 (emphasis in original).

We read that clarification as effectively amending the court's written order to provide that the bankruptcy court has only authorized appellees to wind up the affairs of KOA to the extent of representing the interests of KOA in liquidating its claims in debtor's bankruptcy case, but not addressing who is authorized to wind up the affairs of KOA beyond this bankruptcy case. Given that limitation on the court's ruling, and Ellis's acknowledgment that the court had jurisdiction to determine who was entitled to represent the interests if KOA in the bankruptcy claims process, Ellis's jurisdictional arguments are based on a misunderstanding of what the court did.

CONCLUSION

Ellis has not demonstrated that he has standing to maintain this appeal in his individual capacity. Therefore, the appeal will be DISMISSED.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. HI-04-1057-PBMo

RE: Upland Partners

A separate Judgment was entered in this case on November 9, 2004.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was mailed this date to all parties of record to this appeal.

By: Vicky Jackson-Walker

Deputy Clerk: November 9, 2004